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REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

Koh Kia Hiong v Guo Enterprises Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 964 OF 1987
CHAO HICK TIN JC
30 DECEMBER 1989

Land Law — Agreement for sale and purchase of property — Construction of document — Whether valid contract of sale — Rules of the Supreme Court 1970, O 28 r 4(3)

Companies and Corporations — Agreement — Written memorandum — Company seal not present — Managing director signing for company, effect of

By this originating summons, the plaintiff seeks the determination of the court as to whether a certain document, signed by the parties, constituted a valid contract of sale and purchase of a property. The plaintiff contended that by virtue of the note of 9 May 1987, there was a binding contract between the parties to sell and to purchase the property. This note was signed by the plaintiff and Koo, the managing director of the defendants. However, the defendants argued that the note did not constitute such a contract until a formal option was drawn up by the solicitors for both parties.

Held, allowing the plaintiff's application:

(1) The court found that Koo did not make known to the plaintiff at the time of or prior to the execution of the note that the sale was subject to the approval of the directors/shareholders of the defendant. If he did want such a condition, he would have expressing stated such in the note.

(2) In construing the note, the court must take into account all the surrounding circumstances including the language used by the parties. Each case was to be decided on its own facts. The purpose of the construction is to determine whether the parties intended to be presently bound to each other or whether, no matter how complete their arrangements might appear to be, they did not so intend until the occurrence of some further event, including the signing of some further document or the making of some further arrangement.

(3) The following factors are clear indicators that both the plaintiff and Koo intended to create a binding contract: the demand for and payment of a deposit, the execution of the note by both parties, the receipt of the deposit and the crediting of the deposit into the defendant's bank account.

(4) The parties did not state that the transaction was 'subject to contract'. The sentence in the note — 'option to be clarified by both parties' — does not introduce any element of a condition or negate the existence of a binding contract.

(5) The absence of the company's stamp is quite immaterial. The issue is whether the note and/or the receipt sufficiently constitute a written memorandum. The written memorandum must contain all the material terms of the contract which have been expressly agreed upon. In the court's view, the note constitutes what is known as an open contract where the three essential elements are specified: names of the parties; description of the property; and the price.

Cases referred to

1 *Daiman Development Sdn Bhd* v *Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56 (folld)
2 *Von Hatzfeldt-Wildenburg* v *Alexander* [1911] All ER 148 (folld)
3 *Winn* v *Bull* (1877) 7 Ch D 29 (refd)
4 *Branca* v *Cobarro* [1947] KB 854 (refd)
5 *Choo Si Seng* v *Lee Boon Sai* [1986] 1 MLJ 466 (distd)
6 *Masters* v *Cameron* (1954) 91 CLR 353 (distd)

Legislation referred to

Rules of the Supreme Court 1970 O 28 r 4(3)

K Balachandran (*Catherine Hanam* with him) for the plaintiff.
Philip Loh for the defendants.

Cur Adv Vult

Chao Hick Tin JC: By this originating summons, the plaintiff seeks the determination of the court as to whether a certain document, signed by the parties, constituted a valid contract of sale and purchase of a property. The questions which the court is asked to determine are:

(1) Whether the document in writing signed by the plaintiff and the defendants on 9 May 1987 contemporaneously with the payment of $5,000 by the plaintiff to the defendants, as evidenced by the defendants' official receipt No 065 dated 9 May 1987, constitutes at law a valid contract for the sale of the property described therein as 'one unit apartment on 4th storey, Block E, Type E, #04-02 The Hacienda on Mukim 27 lot 22-1, 22 and 23-2' ('the property') by the defendants as vendors to the plaintiff as purchaser.

(2) Alternatively, whether the document in writing referred to in (1) above together with the defendants' official receipt No 065 dated 9 May 1987 constitute at law sufficient memorandum in writing evidencing a valid contract for the sale of the property by the defendants as vendors to the plaintiff as purchaser.

(3) If the answer in (1) and/or (2) are in the affirmative, then whether the following clauses in the said document in writing:

> 'Kindly let me have your lawyer's names so that my lawyer can contact him for the option.' and 'Option to be clarified by both parties in two weeks.'

conferred a legal obligation on the defendants to deliver a draft written contract to the plaintiff or his solicitors immediately after the signing of the said document in writing or alternatively within two weeks from the date of the contract or memorandum, as the case may be.

In view of the fact that the affidavits filed by the parties show that there is a dispute as to material facts, I ordered, pursuant to O 28 r 4(3) of the Rules of the Supreme Court 1970, that the hearing of the originating summons be by way of oral evidence.

From the evidence, what is really not disputed is that five to six weeks prior to 9 May 1987, the defendants placed a classified advertisement in *The Straits Times* for the sale of the property. The plaintiff was one of two to three persons who responded to the advertisement. Subsequently, there were a few more contacts between the plaintiff and Mr Koo Mong Ing ('Koo') who was the managing director of the defendants, where they discussed about the price for the sale of the property. Apparently, the plaintiff and Koo have known each other since 1979 though the level of their acquaintance is not clear. On the evening of 8 May 1987, Koo invited the plaintiff for dinner at the Singapore Swimming Club, where the plaintiff made a global offer of $290,000, $250,000 for the property itself and $40,000 for the fittings and furniture. Koo agreed to consider the offer and promised to contact the plaintiff the next day which Koo did. As a result, the plaintiff turned up at the defendants' office between 9am to 9.30am on 9 May 1987. The plaintiff brought along a typewritten note. At that meeting, further words were added on to the note by the plaintiff and the full contents of the note, which both parties have signed, are in these terms:

> This serves that I, Koh Kia Hiong, NRIC No 0150777/Z agree to purchase one unit apartment on 4th storey Block E, Type E, #04-02 The Hacienda on Mukim 27 lot 22-1, 22 and 23-2, for *$290,000* from Guo Enterprises (P) Ltd of 66 Tannery Lane #05-03, Singapore 1334.
>
> Enclosed herewith is a booking fee of *$5,000 (DBS 114739)* as a deposit for the purchase of above flat free from encumbrances. (*Two hundred fifty thousand only for house.*)
>
> Kindly let me have your lawyer's name so that my lawyer can contact him for the option.
>
> *Fixtures, arrears, furnishing appliance, ... etc $40,000 (forty thousand only).*
>
> I agree to the above
> Sgd
>
> Koh Kia Hiong
> I/C No 0150777/Z
>
> I agree to the above
> Sgd
>
> Acting as managing director
> Koo Mong Ing
> NRIC No 0754536/C
>
> *Total for package deal $290,000 (two hundred ninety thousand only).*
>
> *Option to be clarify by both parties in two weeks*
>
> [The words in italics are the words inserted by the plaintiff in writing at the meeting; the word 'clarify' in the last sentence is clearly grammatically wrong and should be 'clarified'.]

The plaintiff issued a cheque for a sum of $5,000 in favour of the defendants as a deposit for the purchase. A receipt in favour of the plaintiff stating that the sum was in payment of 'deposit for purchase of #04-02 Hacienda Grove' was issued on behalf of the defendants.

On or about 18 May 1983, Koo wrote a letter to the plaintiff enclosing a cheque for $5,000 in refund of the deposit made. The cheque was dated 14 May 1987. However, this letter and the cheque were not received by the plaintiff until 21 May 1987: see exh 'P1'.

The plaintiff contended that by virtue of the note of 9 May 1987, there was a binding contract between the parties to sell and to purchase the property. On the other hand, the defendants argued that the note did not constitute such a contract until a formal option was drawn up by the solicitors for both parties.

In his evidence before me, the plaintiff said that Koo did not at any time that morning say to him that the sale was subject to the approval of the other directors of the defendant company. In his mind, the payment of the deposit plus the signatures on the note constituted a binding contract between the parties. When asked to explain the words in the note ('option to be clarified by both parties in two weeks'), the plaintiff said that those words were intended to mean that the parties would get their lawyers to work out the formal documentation to carry out the transaction in two weeks. To him the word 'option' meant legal documentation.

In his evidence, Koo said that the defendants bought the property in 1983 for a sum of $350,000. It was rented out for a period in 1985/6. It has remained vacant since. Previously, the defendants have advertised to rent out the property. However, some time before 9 May 1987, Koo decided to instruct his clerk, one Mary Teo (DW2), to advertise the property for sale. Koo said that by that advertisement his real intention was to gauge the market. But he admitted that the global sum of $290,000 offered by the plaintiff was, in his view, reasonable in the market condition then. He said he asked the plaintiff to pay a deposit of $5,000 in order to assess his sincerity and also to see if the plaintiff could afford to buy. More importantly, he said before he signed the note, he made it clear to the

plaintiff that the sale was subject to the approval of the defendant company, ie the other directors. He needed two weeks to get the approval. It should be noted that in the company, besides Koo and Mary Teo (who was a nominee director), the only other director was Koo's own mother, Madam Lim Buay Choo. Koo said because the sale would be at a loss, he needed the approval of his mother. There was no intention on his part to create a binding contract at that stage.

The first issue of fact which I have to decide is this: did Koo make known to the plaintiff at or prior to the execution of the note that the sale and purchase was to be subject to the approval of the board of directors/shareholders of the defendant company? The defendant company was a family concern, with Koo and his mother as the shareholders. Mary Teo has subsequently become a shareholder. For a period of four to five weeks, the plaintiff was negotiating with Koo. If Koo had wanted to, he could easily have consulted his mother and obtained her views on the proposed sale. I find that in all probability his mother (who according to counsel for the defendant could only speak the dialect called 'Hin Hua') left everything to him. Having thought through overnight the offer made by the plaintiff at the Singapore Swimming Club on 8 May 1987, Koo decided to accept it and thus contacted the plaintiff to come to Koo's office. It must be mentioned that the other persons who responded to the advertisement for sale did not show any real interest as they did not follow up or make any offer to purchase. The plaintiff was then the only serious purchaser. Accordingly, I find that Koo did not mention to the plaintiff that the sale was subject to the approval of the directors/shareholders. He was prepared to sell to the plaintiff because the price offered, as conceded by Koo, was the market price. Thus he asked for a deposit of $5,000, signed the note and instructed his clerk to issue a receipt for the deposit.

It seems to me only reasonable that if Koo had wanted the contract to be subject to the approval of the company, he would have expressly so stated in the note. Koo tried to explain that this was not done because he was not fluent in English; he trusted the plaintiff and did not think it was necessary that that point be put down in the note. I am unable to accept that explanation. I have heard Koo in the witness box. He did not appear to me to be a naive person; on the contrary I got the distinct impression that he is a shrewd businessman. His answers in the witness box were sometimes evasive. He could have refused to sign the note.

As I have said, this transaction was not concluded on the spur of the moment. Koo had ample time to reflect. In fact, he had been thinking of the sale for several weeks. It might well be that Koo's original intention of inserting the advertisement for sale in the newspaper was to gauge the market; on this I make no determination. Assuming that to be true, then sometime after that he must have decided that if the price was right he would sell. Even Koo said that the defendant company then needed financial support.

In this connection, I must refer to the evidence of Koo's clerk, Mary Teo. She said that on the morning in question, Koo did inform the plaintiff that Koo needed the approval of the rest of the shareholders and directors. If the approval was obtained then the company would sell; otherwise the deposit would be refunded to the plaintiff. But Mary Teo admitted that though she was five to six feet away from Koo and the plaintiff, she did not hear all the conversation between them as she was doing her work. Though Mary Teo was not able to recall how many advertisements for sale of the property she inserted in the newspapers and was not able to recall in what language Koo spoke to the plaintiff, yet she said she was sure that Koo did mention to the plaintiff about seeking approval.

Mary Teo now owns 7% of the shares of the defendant company and is clearly an interested party. The reliability of her evidence is certainly suspect bearing particularly in mind the fact that she herself said that she was not concentrating on what was said between Koo and the plaintiff as she was doing her own work. On the other hand, the plaintiff struck me as a truthful witness — what he said bears a ring of truth and is in consonance with common sense and normal business practice.

The next question which I have to consider is the construction to be placed on the note. The plaintiff explained that he used the term 'option' because he thought it meant legal documentation and that such documentation had to be worked out by the lawyers of the parties. But in so far as he was concerned, the note constituted a firm commitment to buy and to sell; thus both parties signed and a deposit was paid. On the other hand, Koo explained his understanding of the note as follows: 'This is a record to show that the plaintiff had intention to buy the property. It does not mean that I was bound to sell him the property.'

In determining the proper construction to be given to the note, I must take into account all the surrounding circumstances including the language used by the parties. A number of authorities were cited to me by both parties but obviously each case was decided on its own facts. First, let me quote the following passage from the judgment of the Privy Council in *Daiman Development Sdn Bhd* v *Mathew Lui Chin Teck*[1] at p 58 which set out the applicable principle which should guide this court:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions

> of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words. But, in general, employment of the formula 'subject to contract' as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.

This same principle was declared very much earlier by Parker J in *Von Hatzfeldt-Wildenburg* v *Alexander*[2] where he said:

> ... it is a question of construction whether the execution of a further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through...

I accept the explanation of the plaintiff, who is a lay person, that he used the term 'option' as a reference to the legal documentation required to give effect to the transaction agreed upon. In my opinion, the following factors are clear indicators that both the plaintiff and Koo intended to create a binding contract:

(i) the demand for a deposit;
(ii) the payment of the deposit;
(iii) execution of the note by both parties;
(iv) both parties stated in the note 'I agree to the above';
(v) a receipt was issued for the deposit and on it was stated 'deposit for purchase of #04-02 Hacienda Grove'; and
(iv) the deposit payment was credited into the defendant company's account.

This is how serious business commitments are often entered into. There is a final agreement. What remains to be done is a mere technical formality of embodying the agreement into a formal instrument (ie option) to be drawn up by the lawyers.

The parties did not say that the transaction was 'subject to contract' or 'subject to a formal contract to be drawn up by our solicitors': see *Winn* v *Bull*.[3] The sentence 'Kindly let me have your lawyer's name so that my lawyer can contact him for the option' is self-evident. Then there is the further sentence 'option to be clarified by both parties in two weeks'. The word 'clarified' means to make clear and when this sentence is read in conjunction with the earlier sentence just quoted, it must mean that the parties' solicitors would work out the option in two weeks. They did not want the matter to drag. They wanted the transaction to be formalized as soon as possible; thus they specified two weeks. In my judgment, these two sentences do not introduce any element of a condition and do not negate the existence of a binding contract. My reading of the note is that both parties were determined to hold themselves bound to each other. To adopt the words of Lord Greene in *Branca* v *Cobarro*[4] at p 858, 'they realized the desirability of a formal document as many contracting parties do but they were determined that there should be no escape for either of them in that interim period between the signing of this document and the signature of a formal agreement'.

Counsel for the defendant company relied upon *Choo Si Seng* v *Lee Boon Sai*[5] and *Masters* v *Cameron*.[6] In *Choo Si Seng*,[5] the plaintiff failed to show that there was a binding contract. But there, the document in question was actually a receipt which was drawn up by the plaintiff who was a solicitor and he did not sign it at all. In *Masters*,[6] where the document in question stated that Cameron agreed to sell a property to Masters 'subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions' and Masters agreed to purchase the property 'on the above terms and conditions', the Australian High Court first declared, and if I may say so with respect correctly, that such cases fall into three classes and I would quote what it said at p 360:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases there is a binding contract ...

It then went on to rule that the words used there had been recognized throughout the cases as prima facie to 'create an overriding condition so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract'. In my view, the fact situations and the relevant words used in these two cases are different from the present case. I find that, for reasons best known to Koo, or perhaps because subsequently his mother expressed reluctance, he decided to back out of the transaction sometime on or immediately before the 18 May 1987.

There remains three subsidiary points which the defendants have raised and I propose to deal with them in

turn briefly. First, Koo said in evidence that he signed the note in his personal capacity. Thus he did not use the company's stamp. But this is not what appears on the note as he signed 'acting as managing director'. It must obviously mean that Koo was signing for the defendant company as para 1 of the note expressly states that the plaintiff agreed to purchase the property from Guo Enterprises (P) Ltd. Koo contended that he did not expressly sign 'for and on behalf' of the defendant company. I do not see any real difference between 'acting as managing director' and 'for and on behalf of the company'. In both instances, he would be acting for the defendant company. The absence of the company's stamp is quite immaterial.

Secondly, reliance was placed by the defendant company on certain communications exchanged between the parties' solicitors. On 15 May 1987, the plaintiff's then solicitors, Don Cheang & Co, telexed to the defendants' solicitors, Chan Loh & Partners, asking for the draft option as soon as possible. On 25 May 1987, the present solicitors for the plaintiff, Ramdas & Wong, telexed to Chan Loh & Partners asking for the sale and purchase agreement. On 26 May 1987, Chan Loh & Partners replied that they had no instructions to proceed with the sale of the property. Not that it matters, it would appear that this telex of 26 May 1987 was not brought to the attention of the solicitor in charge at Ramdas & Wong because on 3 June 1987 a telex was sent out by Ramdas & Wong stating 'we refer to our telex of 25 May 1987 to which we have had no reply' followed by a request to Chan Loh & Partners for the 'draft option without further delay'. Mr Chan submitted that the different documents requested by the plaintiff's solicitors, first a draft option, then a sale and purchase agreement, and then a draft option, show that there was really no binding arrangement concluded between the parties. I am unable to accept that submission. First, the document that this court is asked to construe is not the correspondence written subsequently between the solicitors for the parties but the note itself. Second, and more importantly, an option when exercised (and here there cannot be any doubt that the plaintiff would exercise the option when it is eventually prepared) would constitute the formal agreement between the parties as would be the case if the parties had instead prepared and executed a sale and purchase agreement. In short, either document would achieve the same result. In the context, it seems to me to be just a matter of label and cannot in any way materially alter what was concluded between the plaintiff and the defendant company by the execution of the note and the payment of the deposit.

Thirdly, and the final subsidiary point: does the note and/or the receipt sufficiently constitute a written memorandum? Of course, the written memorandum must contain all the material terms of the contract which have been expressly agreed upon. The omission of a single term is fatal. However, on the evidence I find that while the plaintiff and Koo had talked about completion date for the transaction, nothing definite was agreed upon and that they would leave that as a matter of details to be worked out by their solicitors. In my view, the note constitutes what is known as an open contract where the three essential elements are specified: names of the parties; description of the property; and the price.

In the result, I grant an order in terms of prayer 1 of the originating summons with costs to the plaintiff. I also order that the parties and their solicitors work out a draft agreement to be formally executed by the parties within 14 days. In view of what I have decided herein, I make no order on the Originating Summons No 978/87 taken out by the defendant company against the plaintiff to determine the very same issue and fix costs for that originating summons at $1,000.

Order accordingly.

Solicitors: *Ramdas & Wong*; *Chan Loh & Partners*.

Reported by *Terence Tan Bian Chye*

Bangkok Bank Ltd v Cheng Lip Kwong

HIGH COURT (SINGAPORE) — SUIT NO 5186 OF 1986
YONG PUNG HOW J
7 DECEMBER 1989

Banking — Guarantee — 'Conclusive evidence' clause, effect of

Words and Phrases — 'For the time being'

The plaintiffs are a bank incorporated in Thailand and having a place of business in Singapore. By a guarantee in writing ('the guarantee'), the defendant and two others severally guaranteed the payment of any outstanding liability due to the plaintiffs by a corporate customer ('the company') on account of moneys advanced to the company. The defendant's liability was 25% of the total amount due. The plaintiffs demanded in writing from the defendant the payment of $1.25m being the defendant's liability on his proportionate 25% share of the total amount due. The plaintiffs applied under a notice for further directions for the defence to be struck out under O 18 r 19 on the ground that it disclosed no reasonable defence, was frivolous or vexatious, and an abuse of the process of the court. The assistant registrar ordered that the defence be struck out under O 18 r 19. The defendant's appeal was essentially based on technicalities. A number of grounds of appeal were raised. The main ground was that the certificate relied upon by the plaintiffs was not in accordance with cl 6(c) of the guarantee under which it had been issued. The defendant contended that the certificate was not issued in accordance with cl 6(c), and was therefore ineffective, because the words 'for the time being' in the clause meant that the certificate must certify the amount due and owing by the defendant to the plaintiffs on the date of issuance of the certificate or, at least, the amount certified must be 'contemporaneous' with the date of the certificate.